License agreements in which the customer electronically accepts the terms by clicking ("I agree") do not comply with the requirement of a written agreement signed by the licensor and customer as set forth in 86 Ill. Adm. Code 130.1935(a)(1)(A). (This is a PLR.)

May 16, 2006

Dear Xxxxx:

This letter is in response to your letter dated January 18, 2006, in which you request information.   The Department issues two types of letter rulings.   Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete.   Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110.   The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired.   A GIL is not a statement of Department policy and is not binding on the Department.   See 2 Ill. Adm. Code 1200.1120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.   In your letter you have stated and made inquiry as follows:

The purpose of this letter is to request a ruling that the enclosed Subscriber Software License Agreement, effective January 1, 2006 ('Agreement'), as described below, is a license of software that is not a taxable retail sale as provided in 86 Ill. Adm. Code Section 130.1935(a)(1)(A-E). The 'Agreement' is attached to this letter and marked Addendum #1. This Private Letter Ruling request involves periods beginning with and subsequent to the effective date of the 'Agreement' (January 1, 2006). Neither an audit examination nor litigation is pending with the Illinois Department of Revenue ('Department') involving COMPANY, with respect to the Retailer's Occupation Tax ('ROT') or the 'ROT' issues presented below. The 'Department' has not previously ruled on the same or similar issues presented below for the 'Company' or a predecessor. The 'Company' has not previously submitted the same or similar issues to those presented below to the 'Department'. Enclosed please find a Power of Attorney, Form IL-2848, authorizing Tax Director, to represent the 'Company' in this matter.

STATEMENT OF FACTS

The 'Company' has developed a software application used by real estate professionals in providing professional real-estate related services (i.e., managing customer leads, making presentations, scheduling, etc.). The 'Company' offers its software application via the internet. Potential customers access the company's website where the 'Agreement' is presented to them. They enter into the 'Agreement' which allows them to have access to and use the software application, via clicking the 'I Agree' button on the web page being viewed. The typical license period covered by the 'Agreement' is one year, after which, the subscription may be renewed on a month-to-month basis.

The software application can only be accessed through the internet. The 'Company' has the ability to restrict access if the subscription fees are not paid, and after the initial license period, should a customer not wish to license on a month-to-month basis.

The terms of the license provide that the license is a personal, limited, revocable, nonexclusive, non-sublicensable, non-transferable license. The application cannot be reproduced in whole or in part. Customers may not sell, sublicense, rent, lend, lease, timeshare, publicly display or perform, commercialize, or transfer any part of the application.

The terms of the agreement state that the application is being licensed not sold.

RULING REQUESTED

1.   The Subscriber Agreement satisfies the conditions set forth in 86. Ill. Adm. Code Section 130.1935(a)(1)(A-E) and, thus, is a license of software that is not a taxable retail sale for purposes of the Retailer's Occupation Tax.

RELEVANT AUTHORITY

Illinois Regulation, 86 Ill. Adm. Code Section 130.1935 states that:

(a) Computer Software means all types of software including operational, applicational, utilities, compilers, templates, shells and all other forms. Canned software is considered to be tangible personal property regardless of the form in which it is transferred or transmitted, including tape, disc, card, electronic means or other media. The sale at retail, or transfer of canned software intended for general or repeated use is taxable, including the transfer by a retailer of software which is subject to manufacturer licenses restricting the use or reproduction of the software.

(1) A license of software is not a taxable retail sale if:

(A) it is evidenced by a written agreement signed by the licensor and the customer;

(B) it restricts the customer's duplication and use of the software;

(C) it prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;

D) the licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of permitting the licensee to make and keep an archival copy, an such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by notarized statement made under penalties of perjury by the licensor; and

E) the customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set fort [sic] in the license agreement.

STATEMENT OF AUTHORITIES SUPPORTING TAXPAYER'S VIEWS

The 'Company' is unable to locate any authority contrary to its views.

DISCUSSION

Whether the Subscriber Agreement satisfies the conditions set forth in 86. Ill. Adm. Code Section 130.1935(a)(1)(A-E) and, thus, is a license of software that is not a taxable retail sale for purposes of the Retailer's Occupation Tax.

The 'Agreement' must satisfy each of the five conditions outlined in 86 Ill. Adm. Code Section 130.1935(a)(1) to qualify as a non-taxable license of software. In the sections that follow, we have applied each condition of 86 Ill Adm. Code Section 130.1935(a)(1)(A-E) to the applicable, referenced provisioned [sic] of the 'Agreement'

(A)   *It is evidenced by a written agreement signed by the licensor and the customer.*

BINDING AGREEMENT

The 'Agreement' was written by the 'Company', and presented for acceptance to its customers. Customers electronically sign the 'Agreement' by clicking the 'I Agree' button in our web page on which they view the 'Agreement'. The Section 'Binding Agreement' specifies that by clicking the 'I Agree' button the customer and the 'Company' are legally bound by the terms of the 'Agreement'. Clicking the 'I Agree' button represents an electronic signature on both the customer and the 'Company's' part.

(B)   *It restricts the customer's duplication and use of the software.*

The following sections restrict the customer's ability to duplicate the software:

Section 4, APPLICATION LICENSE states the following:

License Grant. During the term of your Subscription, and subject to all terms and conditions of this Agreement, Company hereby grants you a personal, limited, revocable, nonexclusive, non-sublicensable, nontransferable license to do the following, but only for your own internal purposes (for example, not for re-sale, shared use, distributed use, service bureau use, framing or posting to, or using on or in, another's website or other media, etc.) and only in a manner consistent with (i) the User Documentation provided by Company and relating to the Application **('User Documentation. Limitations.** Except as expressly permitted above in this Section 4, you may not receive, access, use or reproduce the whole or any part of the Application,

any Included Content, the User Documentation, any Modifications or any Copies (the '**Company Items**'). You may not: (a) sell, sublicense, rent, lend, lease, timeshare, publicly display or perform, commercialize, or transfer any of the Company Items in whole or in part, or otherwise make any of the Company Items in whole or in part available to any third party; (b) use, on a re-seller, service bureau, shared-use or distributed-use basis, any of the Company Items in whole or in part for the benefit of any third party; (c) modify, translate, or create derivative works of any of the Company Items in whole or in part; (d) reverse assemble, reverse compile, or reverse engineer any of the Company Items in whole or in part; (e) alter or modify any disabling, monitoring, tracking or data-capture mechanism that may be resident in any of the any of the Company Items; (f) remove, alter, or obscure any copyright notice or other proprietary notice or legend that is on or in any of the Company Items; (g) use any part of any of the Company Items to transmit or facilitate the creation or transmission of email messages in violation of applicable laws or otherwise in excess of one thousand (1,000) bulk or marketing email messages in any seven (7) day period; or (h) receive, access or use any part of any of the Company Items for fraudulent purposes, in violation of any laws, regulations or rights of others, in any way that undermines, interferes with or otherwise harms or threatens others, others' activities or any of the Company Items or their integrity, security, operability or stability, to harass others, or in violation of this Agreement or the User Documentation (as any of them may be modified from time to time). You agree to comply with all applicable laws and regulations pertaining to your receipt of, access to or use of any of the Company Items. Export of any of the Company Items, or of any access to or use of any of them, is not permitted.

Section 5, OWNERSHIP; CONFIDENTIALITY states the following:

The Application and other Company Items are being licensed to you, not sold. Except for the limited license granted in Section 4 above (or elsewhere expressly in this Agreement), the Company and its licensors own and retain all right, title, and interest in and to the Application in whole and in part, all Included Content, all Modifications, the User Documentation, all copies of any of the foregoing ('**Copies**') and all intellectual, industrial, and proprietary rights in or relating to any of the foregoing (including, without limitation, all copyrights, patent rights, trademark rights, and trade secret rights). You will keep confidential, take reasonable steps to safeguard, not sell, transfer or distribute, not disclose to or share with others, not make or permit any unauthorized use of, and at all times act reasonably to preserve the security of, the Application and all other Company Items.

(C)   *It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor.*

The following sections restrict the customer's ability to duplicate the software:

Section 4, APPLICATION LICENSE states the following:

License Grant. During the term of your Subscription, and subject to all terms and conditions of this Agreement, Company hereby grants you a personal, limited, revocable, nonexclusive, non-sublicensable, nontransferable license to do the following, but only for your own internal purposes (for example, not for re-sale, shared use, distributed use, service bureau use, framing or posting to, or using on or in, another's website or other media, etc.) and only in a manner consistent with (i) the User

Documentation provided by Company and relating to the Application **('User Documentation. Limitations**. Except as expressly permitted above in this Section 4, you may not receive, access, use or reproduce the whole or any part of the Application, any Included Content, the User Documentation, any Modifications or any Copies (the **'Company Items'**). You may not: (a) sell, sublicense, rent, lend, lease, timeshare, publicly display or perform, commercialize, or transfer any of the Company Items in whole or in part, or otherwise make any of the Company Items in whole or in part available to any third party; (b) use, on a re-seller, service bureau, shared-use or distributed-use basis, any of the Company Items in whole or in part for the benefit of any third party; (c) modify, translate, or create derivative works of any of the Company Items in whole or in part; (d) reverse assemble, reverse compile, or reverse engineer any of the Company Items in whole or in part; (e) alter or modify any disabling, monitoring, tracking or data-capture mechanism that may be resident in any of the any of the Company Items; (f) remove, alter, or obscure any copyright notice or other proprietary notice or legend that is on or in any of the Company Items; (g) use any part of any of the Company Items to transmit or facilitate the creation or transmission of email messages in violation of applicable laws or otherwise in excess of one thousand (1,000) bulk or marketing email messages in any seven (7) day period; or (h) receive, access or use any part of any of the Company Items for fraudulent purposes, in violation of any laws, regulations or rights of others, in any way that undermines, interferes with or otherwise harms or threatens others, others' activities or any of the Company Items or their integrity, security, operability or stability, to harass others, or in violation of this Agreement or the User Documentation (as any of them may be modified from time to time). You agree to comply with all applicable laws and regulations pertaining to your receipt of, access to or use of any of the Company Items. Export of any of the Company Items, or of any access to or use of any of them, is not permitted.

Section 5, OWNERSHIP; CONFIDENTIALITY states the following:

The Application and other Company Items are being licensed to you, not sold. Except for the limited license granted in Section 4 above (or elsewhere expressly in this Agreement), the Company and its licensors own and retain all right, title, and interest in and to the Application in whole and in part, all Included Content, all Modifications, the User Documentation, all copies of any of the foregoing ('**Copies**') and all intellectual, industrial, and proprietary rights in or relating to any of the foregoing (including, without limitation, all copyrights, patent rights, trademark rights, and trade secret rights). You will keep confidential, take reasonable steps to safeguard, not sell, transfer or distribute, not disclose to or share with others, not make or permit any unauthorized use of, and at all times act reasonably to preserve the security of, the Application and all other Company Items.

(D)   The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of permitting the licensee to make and keep and archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by notarized statement made under penalties of perjury by the licensor.

Section 4, APPLICATION LICENSE states that a customer must download, install, and use the software on the customer's personal computer. Thus, the software must be stored and archived on the customer's computer.

Section 7, MECHNICAL SUPPORT provides for the following:

The 'Company' provides customers with technical support should customers lose access to or lose functionality of the software. The customer is able to re-download any of the required files.

Section 8, MAINTENANCE states the following:

The 'Company' will repair faults in the applications that materially degrade its functionality or performance.

(E) *The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set fort* [sic] *in the license agreement.*

Section 10, SUSPENSION; TERMINATION states that the 'Company' will suspend access to the use of the application; thus, making the application inoperable via severing (destroying) the customers connection with the 'Company's' application.

DEPARTMENT'S RESPONSE

Generally, sales of "canned" computer software are taxable retail sales in Illinois. Sales of canned software are taxable regardless of the means of delivery. For instance, the transfer or sale of canned computer software downloaded electronically would be taxable.

However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See subsection (c) of 86 Ill. Adm. Code 130.1935. Custom computer programs or software must be prepared to the special order of the customer.

If transactions for the licensing of computer software meet all of the criteria provided in subsection (a)(1) of Section 130.1935, neither the transfer of the software nor the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

A)   It is evidenced by a written agreement signed by the licensor and the customer;

B)   It restricts the customer's duplication and use of the software;

C)   It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;

D)   The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and

E)   The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software under subsection (c) of Section 130.1935, they may not be

taxable. But, if maintenance agreements provide for updates of canned software, and the charges for those updates are not separately stated and taxed, then the entire agreements would be taxable as sales of canned software.

Please note that the license agreements in which the customer electronically accepts the terms by clicking "I agree" do not comply with the requirement of a written agreement signed by the licensor and customer. In order to comply with the requirements as set out in (a)(1) of Section 130.1935 you must have a written "signed" agreement.

The "Software License Agreement" submitted with your letter does not qualify as a license of canned computer software. This is because it does not meet the criteria for a license of software as set out in subsection (a)(1) of Section 130.1935. The COMPANY license agreement requires only an electronic signature. As noted above, an electronic signature does not comply with the requirement at Section 130.1935(a)(1)(A) of a written "signed" agreement. Therefore, the transfer of the software and any subsequent software updates will be subject to Retailers' Occupation Tax.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

If you have further questions concerning this Private Letter ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Martha P. Mote
Associate Counsel

MPM:msk